exhaustively examined, and took the view that that principle did not apply in this case, since he considered it clear that the right to two months' salary in lieu of notice is expressly stated in the Letters of Appointment.

He regarded the retrenchment benefits as being at the most *ex gratia* payments and that the plaintiffs/respondents could therefore not be held to have waived their contractual rights under their Letters of Appointment, or discharged the appellant company from their obligations thereunder. The learned judge added that there was no evidence that the appellant company had either asked the plaintiffs/respondents to elect or of their agreement to waive their rights if they accepted the retrenchment benefits. Accordingly he dismissed the appeal.

It seems to me, as I have said before that paragraph (g) of Part III of the Agreement Exhibit D10 merely extended to the plaintiffs what was lacking in their individual agreement. Whilst signatories of individual agreements who had served the company for less than five years would merely be entitled under Clause 10 to 2 months' notice or 2 months' pay in lieu of notice, those who had a minimum of 5 years "continuous and good service", on being retired or retrenched would under paragraph (g)(i) of Part III of Exhibit D10 be *entitled* (not merely as a payment *ex gratia*) to two months' notice, or in lieu thereof 2 months' pay and two weeks' pay for each year of continuous service over one year.

The term "termination of service" is clearly, in this context, being used synonymously with "retire" or "retrench", so that there is no question of the plaintiffs being entitled both to the payment under Clause 10 in addition to those under paragraph (g)(i) of Part III. ("Retrenchment" in The Shorter Oxford English Dictionary is defined as "curtailment", "limitation" or "reduction"). An employee found medically unfit under paragraph (f) of Part III, I think, will be "retired" in normal parlance. In the same paragraph the term "termination of service" appears, as it subsequently appears in paragraph (g)(ii) again in connection with employees retiring on reaching the retirement age of 55 years.

It is therefore not a question of a double entitlement on the part of the plaintiffs, but one of which category such payment would fall under, and I would with respect say that the plaintiffs received payment in the proper category. Indeed Exhibit P4 will show that they received more than they were entitled to — having also received salary for annual leave due and one month's salary *ex gratia*.

I would therefore allow this appeal with costs here and in the court below.

Raja Azlan Shah F.J. concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Mohamed Yaacob & Gomez.*

UNITED MALAYAN BANKING CORPORATION BHD. v. GOH TUAN LAYE & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) November 28, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 56 of 1974]

Land Law — Deposit of title deeds with bank to secure overdraft — Owner subsequently agreeing to sell land to respondent — Judgment in default obtained by bank against owner — Writ of seizure and sale and prohibitory orders obtained — Intervention by the purchasers — Application by interveners to set aside prohibitory orders — No caveat entered against the lands — Priorities — First in time entitled to priority, other things being equal — Kelantan Land Settlement Ordinance 1955, s. 3(2) — National Land Code, s. 206.

The appellants had given an overdraft to a firm and to secure the overdraft three partners of the firm deposited with the appellants documents of title relating to their lands. They did not caveat the lands as they were prohibited by the Kelantan Land Settlement Ordinance, 1955 from so doing. Subsequently the owner of the land agreed to sell the lands to the respondents, who paid the purchase price in full. No caveat was entered by them. The appellants obtained judgment in default against the firm and subsequently obtained a writ of seizure and sale and prohibitory orders relating to the lands. The respondents intervened and applied to set aside the prohibitory orders. The learned trial judge set aside the prohibitory orders on the ground that on the date of those orders the respondents had paid the full purchase price for the lands, that the owners were then only trustees of the land on behalf of the respondents, the owners had no beneficial interest in the lands and they had therefore nothing to be seized by their creditors, the appellants. The appellants appealed to the Federal Court.

Held, allowing the appeal: (1) at the time when the respondent became equitable owners of the lands which was later in time than when the documents of title were deposited with the appellants, there were two parties with equitable interests, all interests being unregistered and unprotected by caveats;

(2) in these circumstances, the appellants were entitled to priority, other things being equal;

(3) the appellants had not been guilty of any act or omission which had or might have the effect of inducing the respondents to act to their prejudice and therefore they should have priority over the respondent's equitable interest.

Cases referred to:-

(1) *Karuppiah Chettiar* v. *Subramaniam* [1971] 2 M.L.J. 116.

(2) *Butler* v. *Fairclough* 23 C.L.R. 78, 91.

(3) *Abigail* v. *Lapin* [1934] A.C. 491, 501.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse (*Mohamed Dzaiddin bin Abdullah* with him) for the appellant.

A. Wilson for the respondent.

Suffian L.P.: The United Malayan Banking Corporation Ltd. (plaintiff in the lower court and appellant before us) gave an overdraft to a firm, Sharikat Chin Tong (1967). To secure the overdraft, on April 27, 1968, three partners of the firm deposited with the bank documents of title relating to their lands.

The firm did not pay the whole or part of the amount of the overdraft. On April 13, 1970, the bank filed a suit against the firm in the High Court at Kota Bharu, Civil Suit No. 30 of 1970, out of which this appeal arises. The bank in their statement of claim alleged that the firm was indebted to it in a specified sum. The bank made no mention of any lien.

The firm did not appear. On January 18, 1971, the bank obtained judgment in default against the firm.

On January 1, 1972, the bank obtained a writ of seizure and sale and prohibitory orders relating to these lands.

On April 22, 1972, six interveners (the first six respondents before us) applied to set aside the prohibitory orders relating to 14 specified pieces of land. On January 17, 1973, another intervener (seventh respondent before us) made a similar application relating to part of one piece of land which he claimed he had bought together with the third intervener.

The learned judge granted the interveners' applications and set aside the prohibitory orders. The bank has appealed to us.

The following facts are also not disputed. As already stated, the owners of the lands deposited their titles with the bank on April 27, 1968. As regards two lots, Lots 553 and 578, the owners had previously, on December 19, 1967, agreed to sell them to the interveners and on that day received $5,000 by way of deposit. There was no transaction previous to the date of the deposit as regards the other lots.

As regards all the lots the owners executed agreements of sale agreeing to sell the land to the interveners at various dates in March, 1970, that is after the date of the deposit but prior to the date of the prohibitory orders. Prior to the date of the prohibitory orders the interveners paid in full the balance of the purchase price.

It was only subsequently (on January 18, 1971) that the bank entered judgment in default against the firm.

The learned judge set aside the prohibitory orders on the ground that on the date of these orders the interveners had paid the full purchase price for the lands, that the owners were then only trustees of the land on behalf of the interveners, the owners had no beneficial interest in the lands, they had therefore nothing to be seized by their creditors the bank. The learned judge followed the decision of this court in *Karuppiah Chettiar* v. *Subramaniam*,[1] which decision counsel for the interveners both in the lower court and here argued is on all fours with this case.

Let us examine whether or not it is on all fours with this case.

There on November 8, 1968, M.S. sold all his interest (a share) in a piece of land to Subramaniam. A memorandum of transfer was executed and stamped on the date of the sale, but M.S. was unable to deliver to Subramaniam the document of title to enable the transfer to be registered, and consequently M.S. remained registered as proprietor. On November 13, 1968, Subramaniam caveated the land to protect his interest.

It appeared that M.S. had deposited the issue document of title with a chettiar as security for loans granted to him by the chettiar who apparently had taken no steps to lodge a lien-holder's caveat against the land. The chettiar died. On March 3, 1969, M.S. executed a second memorandum of transfer in respect of the same land in favour of the chettiar's estate, of which Karuppiah was one of the executors. The executors inspected the register document of title and only then did they discover the caveat lodged by Subramaniam.

Karuppiah obtained judgment against M.S. in a civil suit claiming recovery of money lent. On April 22, 1969, Karuppiah obtained a prohibitory order against M.S.'s interest in the land. The prohibitory order was subsequently entered on the register document of title under the Land Code.

On May 9, 1969, Subramaniam intervened and asked for an order that the prohibitory order be set aside on the ground that the judgment debtor M.S. had no beneficial interest in the land.

It was held by the Federal Court that —

(1) M.S., having sold his entire interest in the land and received payment in full, held the legal interest only as a bare trustee for Subramaniam, who was the equitable owner;

(2) Karuppiah as judgment creditor could only take whatever interest the debtor had and in this case the debtor had parted with his whole interest in the land; and

(3) the learned judge was therefore right to set aside the prohibitory order as the debtor had no interest which could be seized and sold.

It will be observed that in *Karuppiah* the contest was between on the one hand a first purchaser Subramaniam in whose favour a transfer had been executed and who had paid the full purchase price and furthermore one who had taken the precaution of caveating the land to caveat his interest, and on the other hand a second "purchaser". This second "purchaser" had originally had deposited with him the title deed to secure repayment of a debt. It is not clear when this was done, but it is quite clear that he never took the precaution of caveating the land as a lien-holder and that when the land was eventually transferred to his estate and his estate obtained the prohibitory order in respect of the land consequent on judgment against M.S. the judgment debtor, M.S. had no further property in the land and there was therefore nothing for the judgment creditor to seize.

Here on the other hand the bank had not bought the lands. They only had the documents of title deposited with them to secure repayment of an overdraft. Also, they had not caveated the lands to protect their interest; but that is not their fault because they were prohibited by law (section 3(2) of the Kelantan Land Settlement Ordinance, 1955) from doing so. Nevertheless the law is quite clear: possession of the titles gives them an equitable interest in the lands, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to some one other than the registered proprietor.

Here the interveners had also like the chettiar's estate in *Karuppiah* purchased the lands. Here too like the chettiar the interveners had not caveated the lands. But unlike in *Karuppiah* where the chettiar could have caveated his interest as a lien-holder if that was prior in time to the first sale to Subramaniam,

here the interveners could not have caveated or registered their interest because they too like the bank were prohibited by the same law already quoted from so doing.

So the position here is that at the time when the interveners became equitable owners of the lands which was later in time than when the documents of title were deposited with the bank, there were two parties with an equitable interest, on the one hand the bank, and on the other each of the interveners, all interests being unregistered and unprotected by caveats.

In these circumstances, whose interest should the court protect?

The law applicable was declared by the Full Court on New South Wales in *Butler* v. *Fairclough*,[2] in terms which were explicitly approved by the Privy Council in *Abigail* v. *Lapin*.[3] These are the words of the Australian court which were approved:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the court in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. *In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority.* But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it.

Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat." (My italics.)

In approving the above statement of the law, Lord Wright said at page 502:

"Their Lordships think that case was rightly decided, though it may be that the statement as to retention of the title deeds needs some qualifications."

So in deciding this contest between the bank on the one hand and the interveners on the other, the court should decide in favour of the bank as being first in time, if but only if other things are equal. The court should act on the above principle in the absence of caveats and registrations. The qualification that other things must be equal is important, for an equitable claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing an equitable claimant later in time to act to his prejudice.

In this case was the bank in any way guilty of any act or omission which had or might have had the effect of inducing the interveners to act to their prejudice? I do not think so. If they had been allowed by law to caveat their lien no doubt they would have done so, but they were not so allowed. They had therefore done all they could to protect their interest by taking possession of the documents of title. During the course of arguments it was stated that the bank had parted with possession of the titles, but this is nowhere stated in any of the interveners' affidavits, and in any event counsel for the bank stated that the bank had given the titles to their solicitor and I agree that possession by their own solicitor was possession by the bank. There is no evidence one way or another who had possession of the titles at the time when the land owners executed transfers in favour of each of the interveners, though we know that they are now deposited with the court as a result of court order in Civil Suit No. 50 of 1972 filed on April 27, 1972, by the interveners in which they ask for a declaration that they are legal owners of the lands.

I would respectfully disagree with the learned trial judge and rule that the bank's earlier equitable interest should have priority over the interveners'. This is no doubt hard on the interveners who had parted with their money and would not have known of the bank's equitable interest even if they had inspected the register and who were themselves prohibited by law from caveating the lands.

I would accordingly set aside the learned judge's order, so that the effect of my judgment would have been to revive the prohibitory order in favour of the bank.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Order accordingly.

Solicitors: *Rithauddeen & Aziz; Wilson & Co.*

GOVERNMENT OF MALAYSIA v. OOI KHENG KEE

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) November 28, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 155 of 1974]

Administrative Law — Suit against Government — Whether suit out of time — Public Authorities Protection Ordinance, 1948 — Public Authorities Protection (Amendment) Act, 1974 (Act A 252).

In this case the respondent had brought a suit for loss of support and dependency and for damages arising out of the death of her son who was killed when travelling in a RMAF helicopter which crashed in Kuantan. The appellant had applied for the proceedings to be set aside for non-compliance with the Public Authorities Protection Ordinance, 1948, as the suit was brought over twelve months after the accident. The application had been dismissed in the High Court and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) as the pleadings stood it could not be taken for granted that the act of the Government complained of was an act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, as stipulated by section 2 of the Public Authorities Protection Ordinance, 1948;

(2) the period of limitation of twelve months had been extended to thirty-six months by the Public Authorities Protection (Amendment) Act, 1974 (Act A 252) and it was arguable that this amendment was retrospective, so as to save the suit.